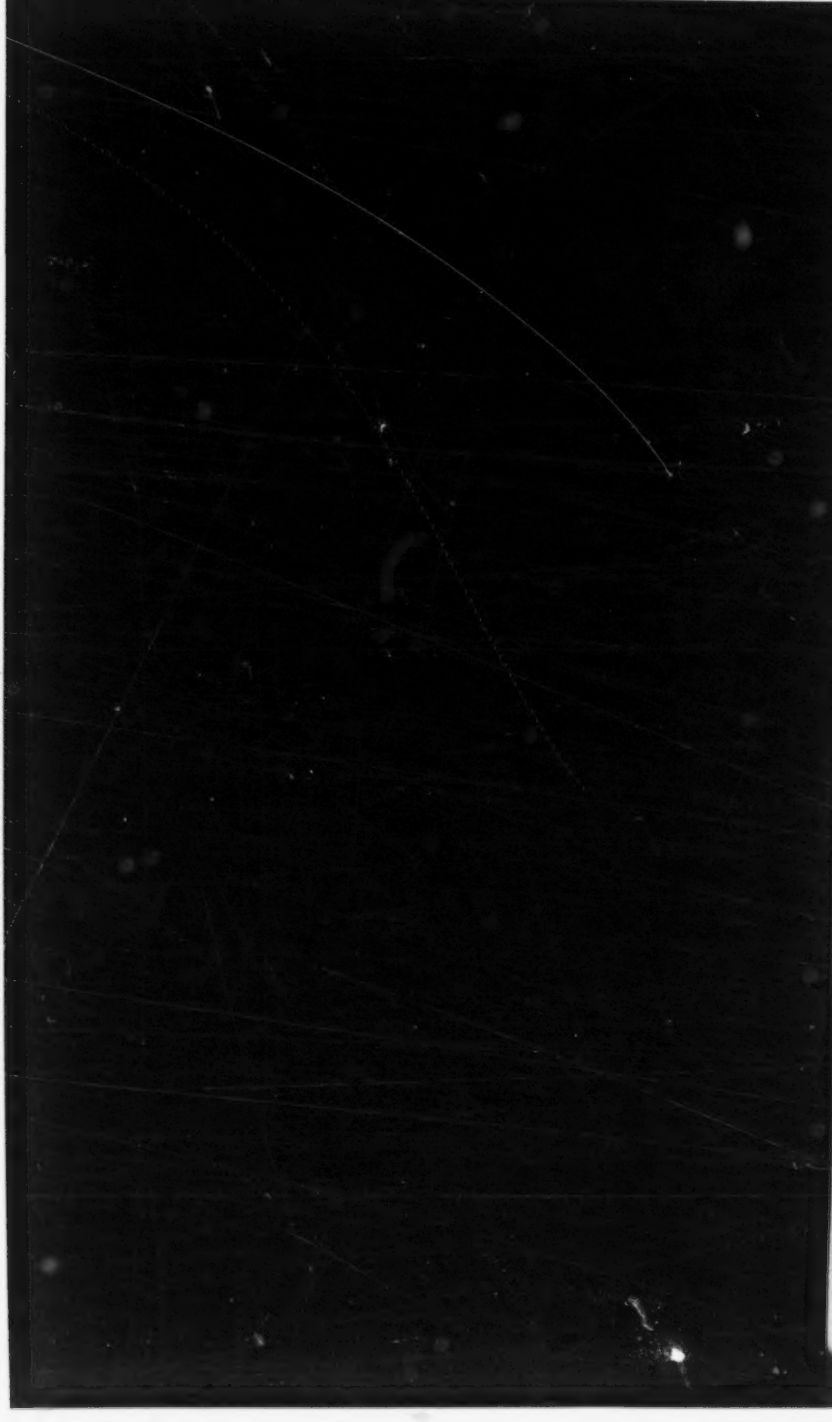

IN THE

# Supreme Court of the United States,

H. HACKFELD & COMPANY, (LIMITED),
A CORPORATION,
*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,
*Respondent.*

**Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Ninth Circuit to Certify to the Supreme Court of the United States, for its Review and Determination, the Case of H. Hackfeld & Company (Limited) a Corporation, Plaintiff in Error, vs. the United States of America, Defendant in Error.**

*To the Honorable the Supreme Court of the United States:*

The petition of H. Hackfeld & Company (Limited), a corporation, respectfully shows to this Honorable Court as follows:

This is a proceeding on writ of error (No. 940), in the Circuit Court of Appeals for the Ninth Circuit, taken from a judgment of conviction rendered against your petitioner, plaintiff in error, upon a criminal information filed in the District Court of the Territory of Hawaii, alleging a violation of the provisions of Section 10 of the Act of Congress, entitled "An Act "in amendment of the various acts relative to immigrants and "the importation of aliens under contract or agreement to per-"form labor," approved March 3, 1901. (26 U. S. Stats. at L., p. 1084.) Said section reads as follows:

"Sec. 10. That all aliens who may unlawfully come to "the United States shall, if practicable, be immediately sent "back on the vessel by which they were brought in. The cost "of their maintenance while on land, as well as the expense "of the return of such aliens, shall be borne by the owner or "owners of the vessel on which such aliens came; and, if any "master, agent, consignee, or owner of such vessel shall refuse "to receive back on board the vessel such aliens, or shall "neglect to detain them thereon, or shall refuse or neglect to "return them to the port from which they came, or to pay the "cost of their maintenance while on land, such master, agent, "consignee, or owner shall be deemed guilty of a misdemeanor, "and shall be punished by a fine not less than three hundred "dollars for each and every offense; and any such vessel shall "not have clearance from any port of the United States while "any such fine is unpaid."

The information (pages 3 to 6 of Transcript on Error) contains three counts alleging, respectively, in effect, that plaintiff in error, as agent of the steamship *Korea* plying between the State of California and the Empire of Japan, did, in the District and Territory of Hawaii,

1st. Refuse to receive back on board said vessel;

2nd. Neglect to detain on said vessel; and,

3rd. Refuse and neglect to return to the port from whence they came, two certain Japanese immigrants, then and there unlawfully in the United States, who had, theretofore unlawfully come to the United States in said vessel.

The cause was tried before the Court, without a jury, upon an agreed stipulation as to facts.

(Transcript on Error, pages 25 to 28.)

From this stipulation it appears that the immigrants, who had been denied admission into the United States at San Francisco, were received on board the steamship *Korea* at that port for the purpose of being deported to Japan, for which country said steamship sailed, touching at Honolulu in course of her voyage.

The only facts, upon which the criminal responsibility of plaintiff in error is claimed by the United States to depend, are set forth in paragraph eighth of the stipulation, which reads as follows:

"*Eighth.* That on the 12th day of November, A. D. 1902, " the said steamship *Korea* did arrive at the port of Honolulu, " in the District and Territory of Hawaii; that at the time of " said steamship *Korea* at said port of Honolulu, the said " immigrants were still on board of said vessel; that said " Japanese immigrants, together with certain deported Chi- " nese, were placed in a room on board said vessel and locked " up by the steerage steward of said vessel. At twelve o'clock, " midnight, of said 12th day of November, A. D. 1902, said " Japanese were still on board said vessel in said room; that " between that time and five o'clock in the morning of the 13th " day of November, A. D. 1902, said Japanese had effected " their escape; that the only method of egress was through " portholes, which were nearly twenty-five feet above the water; " that this method of escape could not have been reasonably " anticipated by the master or officers or agents of said steam- " ship *Korea;* that said escape did not occur by *vis major*, or " inevitable accident; and that said escape did not occur by " reason of any negligence or lack of proper care on the part " of the officers of said vessel or said defendant " (plaintiff in error).

The stipulation then adds:

"*Ninth.* That the said defendant (plaintiff in error) " made search for said escaped immigrants, but up to the " present time have not apprehended the said immigrants, and " said immigrants have not been returned to Japan."

The order of the trial court, submitting the cause recites that the attorneys for the respective parties stipulated in writing " as to the facts and *all the* facts herein, and submit the cause " upon said stipulation, said stipulation being ordered by the " Court placed on file, and, *thereupon*, after argument of " respective counsel, the case is, by the Court, taken under " advisement " (Transcript on Error, p. 29).

Notwithstanding these admitted facts, the Court below found (Transcript on Error, pages 30-33) defendant (plaintiff in error) guilty, as charged in the third count of the information, of *refusing and neglecting to return* said immigrants to the port from which they came, and imposed upon it a fine of $600 and costs.

In this case the United States admits that the escape of the two Japanese from the *Korea* occurred through no wilful

refusal, lack of diligence, or want of reasonable care on the part of plaintiff in error, or of the officers of the vessel.

Plaintiff in error claims, that, under the circumstances of this case, there being no wilful refusal, negligence, or want of proper care on its part, it cannot be guilty of a violation of Sec. 10 of the Act, and the judgment of conviction against it should be reversed, and *all* of the facts being agreed upon, the only function of the Court below was to apply the law to the facts—in other words, to construe the statute, and to determine, whether under the agreed facts, plaintiff in error was guilty of a violation of its provisions.

The case was argued by both sides, before the court of appeals, as involving the construction of the statute, alone, but, by its opinion, rendered upon October 5th, 1903, of which copy is appended, as part of the record, that Court declined to consider the construction of the statute, at all, *and affirmed the judgment*, upon grounds stated in its opinion, as follows:

" The record contains no finding of fact by the Court further " than that the plaintiff in error was found *guilty as charged;* " nor does it state the ground on which the Trial Judge found " the plaintiff in error guilty of the misdemeanor charged. " For ought that we know, the Court found that by placing " the men in the room as it did, without taking precaution " against their escape through the portholes, the plaintiff in " error *neglected* to perform the obligation imposed upon it " by the statute. It is true that the stipulation of the facts " recites *that the escape did not occur by reason of any negli-* " *gence or lack of proper care* on the part of the officers of the " vessel or of the plaintiff in error, and that the method of " escape could not have been reasonably anticipated; *but the* " *Court was not bound* by these recitals, nor was it prevented " thereby from placing upon the stipulated facts, the con- " struction which in its judgment they should properly bear. " Haight vs. Green, 19 Cal., 113." (The italics are ours.)

A petition for a rehearing was presented, and denied by the Court of Appeals.

We contend, as hereinafter set forth, that the Court of Appeals erroneously refused to construe the statute in this case, and determine the question of law submitted to it; that the statute cannot properly bear the construction necessarily given to it by the trial Court, and, therefore, that the judgment of conviction should be reversed.

A certified copy of the entire record of said case in said Circuit Court of Appeals is appended hereto as part of this application, in conformity with Rule 37 of this Honorable Court relative to cases from Circuit Courts of Appeals.

Petitioner is advised and believes that said judgment of the said United States Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, under and in conformity with the provisions of the Sixth section of the Act of Congress entitled, "An Act to establish Circuit Courts of "Appeals, and to define and regulate, in certain cases, the "jurisdiction of the Courts of the United States, and for other "purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by said Act. Petitioner makes this application for a writ of certiorari upon the following grounds:

1. The question of law involved in said judgment is of sufficient importance to make it the duty of the Supreme Court to take jurisdiction by writ of certiorari, to the end that said judgment of the Circuit Court of Appeals may be reversed.

2. The said judgment of the Circuit Court of Appeals is plainly erroneous.

## I.

**The Question of Law Involved in Said Judgment is of Sufficient Importance to Make it the Duty of the Supreme Court to take Jurisdiction by Writ of Certiorari, to the End that Said Judgment of the Circuit Court of Appeals may be Reversed.**

It is true that, in the cases of Lau Ow Bew, 141 U. S., 583; In re Woods, 143 U. S., 202; Lau Ow Bew, 144 U. S., 47; The Three Friends, 166 U. S., 1, and Forsyth vs. Hammond, 166 U. S., 506, the Court has said, in substance, that the case must be important, to warrant certiorari. Petitioner respectfully submits, however, that the Court has taken jurisdiction, by certiorari in cases of no greater importance than this, namely, in Telfener vs. Russ, 162 U. S., 170; The Conqueror, 166 U. S., 110; Panama R. R. Co. vs. Napier S. S. Co., 166 U. S., 280, and Pullman's Palace Car Co. vs. Central Transportation Company,

171 U. S., 138, which can hardly be said to present any more far-reaching or important question than is the one now presented. Here, the construction of a statute of the United States, imposing heavy penalties upon all carriers of immigrants between foreign countries, and the United States or its Territories violating its provisions, is directly involved, and, under the construction given the act by the trial Court, whose judgment is affirmed by the Circuit Court of Appeals, its effect is, practically, to render the owners, agents and officers of ships carrying such passengers absolutely liable for their escape, and subject, criminally, to punishment therefor, notwithstanding the use of the highest degree of care and skill on their part to prevent such escape. Such an obligation certainly would not be presumed in the absence of the most unequivocal language in the statute, as the burden thereby imposed upon the mercantile marine, not only of this country, but of foreign countries entering our ports, would be so great that few, if any carriers, would voluntarily assume it.

The construction of the statute is a matter of vital importance, not only to the petitioner in this case, but to the officers of the United States whose duty it is to prosecute infractions of the law and to the Courts and juries whose duty it is to try them. The sole decision upon which the Court below must have relied, and, upon which alone, the Government relied, upon the argument before the Court of Appeals, is, as we shall hereafter show, based upon a misconception of the meaning of the statute, and will not, as we believe, meet the approval of this Court.

Under its supposed authority, many prosecutions have been had, and many others are pending, and will, doubtless occur in future, where, under the undisputed facts, no negligence upon the part of the owners, agents or officers of the ship is even claimed to exist. If the construction contended for by us be correct, the officers of the Government who are conscientiously endeavoring to perform their duties, should be relieved from the labor of groundless prosecutions, the time of Courts and juries should not be taken up with the trial of such cases, and the defendants should be discharged from the burden and cost of making defenses therein, and of being compelled to appeal from judgments rendered by the District Courts only by reason of what they deem to be an authority controlling their decisions.

## II.

### The Said Judgment of the Court of Appeals is Plainly Erroneous.

The sole reason given by the Circuit Court of Appeals for its refusal to consider the construction of the statute, and for its affirmance of the judgment, was, as before stated, that the Court below *was not bound by* the facts, as stipulated, and the court of appeals cites in support of its position the case of Haight vs. Green, 19 Cal., 113.

Upon examining said case, we do not find that it lays down the rule intimated that the court below is permitted to depart *in any degree* from the *ultimate* facts as presented to it by stipulaton. On the contrary, the ultimate facts as admitted by the stipulation in that case (ejectment) were "that the plaintiff's "testator was the owner of the premises prior to defendant's "entry; that defendant entered under him and now claimed "the premises as her property and is in possession." There was added to this stipulation, the words "the defend- "ant does not design in this stipulation to admit a tenancy "at any time." The Court very properly held that the stipulation as to the *ultimate* facts was sufficient to admit title in plaintiff's testator, and that defendant entered under him. It would, thus, have been immaterial whether such entry and possession was by virtue of a tenancy on the part of defendant, or any other entry subordinate to the title of plaintiff's testator, and therefore the addition of the words last quoted from the stipulation did not, in any degree, vary its legal effect; and the court, under the ultimate facts *stipulated*, found *as matter of law* that plaintiff was entitled to recover.

From the earliest period, the Courts of the State of California have, invariably, held, that where all the facts have been stipulated or agreed to, the function of the Court is simply to apply the law to the agreed facts and to enter its judgment thereon.

It would be burdensome and unnecessary to cite all of the cases in which this doctrine is set forth, and we will therefore limit ourselves to the citation of a few which fully support our contention.

In the recent case of McMenomy vs. A. L. White, 115 Cal., 339, the Court says (page 343):

" The objection to certain findings upon the ground that " they were not justified by the evidence, cannot be sustained. " As the case was submitted upon an agreed statement of the " facts, no findings were necessary, the only question being as " to *what was the law applicable to those facts.*"

In the case of Gregory vs. Gregory (102 Cal., page 51), therein cited, the Court says:

" The agreed statement covered *all* the facts of the case and " if findings had been made, they would have been simply a re- " statement of facts already agreed upon and about which " there was no controversy. But it is well settled that findings " are never necessary upon questions about which there is no " dispute. For example, findings are not necessary where the " allegations of the complaint are not denied, or as to facts " admitted by the pleadings * * * And where a finding " made is conclusive against the right of plaintiff to recover, " findings upon other issues are unnecessary to support the " judgment against him."

In the case of Muller vs. Rowell, 110 Cal., 318, the Court says (page 319):

" The statement of facts so agreed to, took the place and " served all the purposes of a formal finding by the Court. " (Brewster vs. Hartley, 37 Cal., 15.) It is only where the " facts are in issue that findings thereon by the Court are " necessary in any case, and where the parties stipulate in " writing as to what the facts are, and file such stipulation in " the action, it is in all substantial respects *the equivalent of* " *admitting them in the pleadings.*"

In the case of Faulkner vs. Rondoni, 104 Cal., 140, the Court says (at page 143):

" It was not necessary to find upon a fact admitted by the " pleadings, but had the Court found against the admission, it " would, *if material, have been ground for reversal.*"

" A fact, contained in the findings of the Court which con- " tradicts the admissions of the pleadings, will not be regarded, " and *no presumption that it was founded upon competent* " *evidence will be indulged.*" Burnett vs. Stearns, 33 Cal., 468.

To the same effect are the following cases, from which we do not make excerpts, as same would only unnecessarily enlarge this petition, viz:

McDonald vs. Mountain View Homestead Assn., 51 Cal., 210.
Traverso vs. Tate, 82 Cal., 170.
Silvey vs. Neary, 59 Cal., 97.
White vs. Douglas, 71 Cal., 115.
Tracy vs. Craig, 55 Cal., 91.
Bradbury vs. Cronise, 46 Cal., 287.
Estate of Doyle, 73 Cal., 564.

We respectfully request the Court to examine the following portions of the record in the present case:

At page 29 of the Transcript on Error, will be found the order of the Court below, submitting the cause, from which it appears that the attorneys for the respective parties stipulated in writing, "as to the fact, and *all the facts* herein, and submit the "cause upon said stipulation, said stipulation being ordered "by the Court placed on file, and, *thereupon* after argument "of respective counsel, the case is, by the Court, taken under "advisement."

The judgment (page 30 of Transcript) recites that the parties have submitted the case "on a stipulation as to the facts."

Negligence is an *ultimate fact*, and not a conclusion of law.

House vs. Meyer, 100 Cal., 592.

The ultimate fact which was in issue before the Court below, in the present case, was as to whether the plaintiff in error had been guilty of negligence in permitting the Japanese to escape, and *this fact was expressly found in its favor* by the agreed statement of facts.

Therefore, we respectfully submit, that if the Court below had made an express finding, in its judgment, instead of an implied finding as suggested in the opinion of the Court of Appeals, that the plaintiff in error *was guilty of negligence* in placing the deported persons in a room on the vessel under the conditions stated, such a finding must, necessarily, under the authorities cited, have been erroneous, because in direct contradiction of the ultimate fact set forth and determined in the agreed statement, upon which alone the case was tried, "that "said escape did not occur by reason of any negligence or lack "of proper care on the part of the officers of the vessel, or of "said defendant." (Transcript, page 28.)

The circumstances under which the Japanese were locked up, and the existence of portholes through which they might have escaped, and the fact that such method of escape could not reasonably have been anticipated by the officers or agents of the ship, are, at most, but probative facts, the *ultimate fact* in issue as we have stated, being as to whether or not the escape occurred through the negligence of the defendant, which, by the agreed statement, was *determined* in its favor.

We may concede that, if the ultimate fact had not been stipulated, the Court might have had the right to make a finding as to such ultimate fact, from such probative facts as had been stipulated to, and submitted, but, in this case, not only the probative facts but the *ultimate* fact of the non-existence of negligence, drawn as a conclusion or inference therefrom, were expressly agreed to, and the Court could not, either expressly, or by implication in support of its judgment, find contrary thereto.

The Court below must, necessarily, therefore, have rendered its judgment upon an application of the statute, *as construed by it*, to the ultimate facts of the case as found. That such construction and application was erroneous was the sole contention made by plaintiff in error, herein, and the correctness of such construction and application was the sole contention of counsel representing the United States in the Court of Appeals.

Section 10 of the Act of 1891, above quoted, for a violation of which this prosecution was had, is of a highly penal character. A violation of its requirements is not the subject of a civil action for a penalty, but is declared to be a misdemeanor, and punished by a fine of not less than $300. It cannot, therefore, be extended, by implication or construction, to cases not fairly within its terms.

In the language of Chief Justice Marshall, in U. S. vs. Wiltberger, 5 Wheaton, 95, "The rule that penal laws are to be "construed strictly, is, perhaps, not much less old than con- "struction itself. It is founded on the tenderness of the law "for the rights of individuals; and on the plain principle that "the power of punishment is vested in the legislative, not in "the judicial department. It is the Legislature, not the Court, "which is *to define a crime and ordain its punishment*. (The "italics are ours.) It is said, that, notwithstanding this rule, "the intention of the law-maker must govern in the construc- "tion of penal, as well as other statutes. This is true. But this

" is not a new, independent rule, which subverts the old. It is a " modification of the ancient maxim, and amounts to this: that, " though penal laws are to be construed strictly, they are not " to be construed so strictly as to defeat the obvious intention " of the Legislature. The maxim is not to be so applied as to " narrow the words of the statute to the exclusion of cases " which those words, in their ordinary acceptation, or in that " sense in which the Legislature has obviously used them, " would comprehend. The intention of the Legislature is to " be collected from the words they employ. Where there is " no ambiguity in the words, there is no room for construction. " The case must be a strong one indeed, which would justify a " Court in departing from the plain meaning of words, espe- " cially in a penal act, in search of an intention which the words " themselves did not suggest. To determine that a case is " within the intention of a statute, its language must authorize " us to say so. It would be dangerous, indeed, to carry the " principle that a case which is within the reason or mischief " of a statute, is within its provisions, so far as to punish a " crime not enumerated in the statute, because it is of equal " atrocity, or of kindred character with those which are enum- " erated."

We have made the foregoing excerpt at some length for the reason that, ever since the day when the opinion of the great expounder, from which it was taken, was rendered, it has stood as the rule governing the construction of penal statutes in this country, and, we conceive, that only disregard of its principles could have induced the rendition of the judgment in this case.

Section 10 of the Act defines as a misdemeanor, and punishes by fine, three specific acts, all of which are alleged in the information, viz:

1. A refusal to receive immigrants back upon the vessel.

2. A neglect to detain them on the vessel.

3. A refusal or neglect to return them to the port from whence they came.

There is nothing technical in the language of the Act.

There can be no refusal, without the existence of an intention to decline or repudiate the duty or obligation whose performance is demanded, and there can be no neglect to perform such duty or obligation if a reasonable attempt has been made to perform the same.

The words used have a plain, ordinary meaning, and, as above quoted from Judge Marshall, "where there is no ambiguity in the words, there is no room for construction."

The stipulation as to facts admits that the immigrants were locked up in a room on the vessel by its officers, and between twelve o'clock midnight and five in the morning effected their escape by a method which could not have been reasonably anticipated by the master, officers, or agents of the steamship; that the escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel, or of plaintiff in error, and that the latter has made search for the escaped immigrants, but up to the present time has not apprehended them. (Transcript on Error, pages 27 and 28.) Yet, notwithstanding these facts, the Court below found that plaintiff in error did "*refuse* and *neglect* to return (the immigrants) to the port from which they came." (Transcript, page 30.) In making a finding so utterly at variance with the facts, it is apparent that the Court below was misled by the construction placed upon the word "neglect" as used in the statute under consideration, in the case of Warren vs. United States, 58 Fed. Rep., 559, a construction which, as we contend, is entirely unwarranted and indefensible.

A strong circumstance indicating that such was the case is that in the stipulation as to facts, is contained a statement that, "said escape did not occur by *vis major* or inevitable accident." (Transcript, page 28.) In view of the other admitted facts as to the absence of negligence on the part of the defendant, which render such language unnecessary, it is significant that the words last above quoted are taken directly from the opinion in the Warren case, by which it is, in effect, declared, that the master officers and agents of the vessel are, in law, *insurers* of the return of immigrants of the class under consideration, except when prevented by "*vis major* or inevitable accident," and by no other excuse can relieve themselves from criminal liability.

The Warren case is the only one that can be found that attempts to put such a construction upon the Act, and is the only support that can be claimed, or was claimed by the United States in the argument before the Court of Appeals, for the judgment in this case.

In the Warren case it was admitted that the immigrants, who should have been detained on the vessel and returned, did, in fact, escape therefrom, and evidence was offered on the part of the defendant, to prove that there was no negligence or neglect in detaining them, and that they escaped without any negligence or neglect upon the part of the defendant. This evidence was excluded, and the action of the Court therein assigned as error.

The Court further ruled that the defendant was bound, at all hazards, to detain the aliens on board the vessel, and that nothing would relieve him of his obligation to do so, except *vis major* or inevitable accident.

In its decision, the Court of Appeals of the First Circuit goes into much elaborate consideration of other provisions of the Act to show that it was the intention of Congress that no such objectionable aliens should enter the country—a proposition which no one questions, as it is the whole object and purpose of the Act—and then, because of such discovery of the intention of Congress, proceeds to apply to the word "neglect" a meaning which it never had, either technically or colloquially. At the close of the opinion the Court says, "but we have no "doubt that, in view of the *general purposes of the statute* "the word 'neglect' must here receive a common and popular "signification, as the equivalent of 'fail' or 'omit.' The em- "ployment of the term 'neglect' in this sense is neither infre- "quent nor unfamiliar, and assigning to it here any more "restricted or narrow definition *would defeat the whole end* "*of the statute*—a result to be tolerated only when necessary."

With all deference to that Court, we have yet to learn that the common or popular signification of "neglect" is the equivalent of "fail" or "omit." On the contrary, there is not a wayfaring man in the country who would for a moment fail to note the complete distinction in meaning between a charge against him of "neglect" and one of mere omission without any fault on his part.

The fear of the Court that if such an enlarged and unusual definition of "neglect" should be denied, "it would defeat the whole end of the statute," is entirely without foundation. As matter of fact, scarcely a steamer leaves this, or any other great seaport of the United States without more or less deported immigrants thereon, yet, is it not matter of common knowledge that the vast majority of them, under the watchful eyes of the

officers of the vessels transporting them, arrive, in due course, safely at their destination. It is only in an exceptional case that some one or more, having greater cunning or desperation than ordinary, succeed in circumventing their guards, and in escaping from custody.

Nor is the reasoning of the Court immediately preceding this extraordinary definition of "neglect" and leading up to it, and the supposed analogies cited, less free from infirmity.

The Court says: "The statute is analogous to acts regarding "the sale of unwholesome or diseased provisions, or the keep- "ing and storage of dangerous explosives, or the sale of intoxi- "cating spirits. The safety and protection of the public is the "end sought. Upon every one rests the duty to see to it that "no act or omission of his shall endanger that safety, and, if "he fails of the full performance of that duty, good intention, "or the absence of evil intention, will not excuse him. The "responsibility may be regarded similar to that resting upon a "sheriff in case of an escape. He cannot excuse himself by "showing that he had exercised care to keep his prisoner."

It is certainly somewhat strange to hear a learned Court calmly place human beings in the category of substances, in themselves so dangerous or noxious as to place an increased burden of *insurance* of the safety of the persons and property of his neighbors upon the person in whose custody they may be. Certainly the statute does not attempt to do so—on the contrary, the statute contemplates that each of these persons is entitled to a temporary removal to shore, if necessary, and to an examination by the proper officers for the purpose of determining whether he is or is not entitled to enter the United States, and it is only after such examination, and a determination adverse to his right, that the vessel which brought him is required to take him back. But such an executive determination does not degrade him to the condition of a noxious substance, or a wild animal, nor does it impose upon the carrier the liability of a common carrier of goods and chattels, *i. e.*, an insurer against everything except the act of God and the act of the public enemy. Yet that is the condition to which this decision apparently reduces him, with the added pains and penalties attached to a conviction for misdemeanor, with a fine of not less than $300. The analogy between the liability of the defendant and that of a sheriff for an escape made by the Court

is particularly unfortunate, as ever since the days of Sir William Blackstone, at least, an officer has only been liable for a *negligent* escape.

4 Bl. Com., 130.
Sections 316 and 321, Bishop on Criminal Law. (7th Ed.)

Under the facts, as stipulated in the present case, it appears (Transcript, page 27) that the aliens escaped from the ship through portholes, which were nearly twenty-five feet above the water. Whether they succeeded in reaching shore or not, does not appear, but, under the rule laid down in the Warren case, if they had jumped from these portholes or from the deck of the vessel in mid-ocean, and had indubitably perished, the plaintiff in error here would have been guilty of a misdemeanor, notwithstanding that it might have taken every precaution which human skill or care could suggest to prevent the occurrence of such a casualty.

The statement of the proposition would almost seem to be its own refutation.

It is certainly inconceivable to us how a "refusal" could take place without volition, or "neglect" occur without negligence.

So far as we are aware, the Warren case has only once been judicially cited, and that with disapproval.

In United States vs. Spruth, 71 Fed. Rep., 679, the District Court of the Eastern District of Pennsylvania granted a new trial in a prosecution under Section 8 of the Act of 1891, in which a conviction had been had under the supposed authority of the Warren case, and, in his opinion granting a new trial, the learned District Judge says, "To justify a conviction it " seems so clearly necessary to prove willful or negligent " permission to escape that I expressed surprise at what was " supposed to be decided in Warren vs. United States, but " ordered a conviction in deference to that case. Upon further " examination it is found that Warren vs. United States arose " under the tenth section of the statute, in which the language " used is different, and, although the eighth section is cited and " apparently treated as if it should receive a similar construc- " tion, the *decision* is not applicable to the case in hand. It is " not improbable that it will be followed with reluctance, even " as respects the tenth section. The wisdom of such a construc- " tion of language in a criminal statute may be doubted."

Although the District Court felt itself, against its better judgment, bound to follow the Warren case, being the decision of a Circuit Court of Appeals, as *stare decisis*, while the case before it was believed to be precisely similar to that passed on therein, yet it lost no opportunity to disregard it when it was sought to apply it by analogy to another section of the same Act in which similar language was used, and expressed itself, in no uncertain language, in condemnation of the doctrine there announced.

But whatever may be the binding effect of a decision of a United States Court of Appeals upon inferior courts, it is, in no sense, controlling upon other and co-ordinate Courts of Appeals.

> Mast Foos & Co. vs. Storer Mf'g Co., 177 U. S. Reps., p. 485.

The views contended for by us herein have been fully sustained by the opinion of the Attorney General of the United States. In 23 Op. Attys. Gen., p. 271, Mr. Attorney General John W. Griggs, on Oct. 5th, 1900, dealing with a case in which a deposit of $900 had been made with the Collector of Customs, under protest, on behalf of a French steamship, from which three alien immigrants had escaped without fault of the master or agents of the vessel, while holding that the provisions of the Revised Statutes relating to the remission of fines, penalties and forfeitures, did not include offenses against the alien immigration act, used the following language in his opinion to the Treasury Department, to whom an application had been made for the return of the deposit: "But while I "assume nothing relative to the facts in this case, with which "it is your duty to deal, and not mine, I am clearly of the "opinion that in a case where every precaution to detain in "safe custody and prevent escape has been rigidly taken, and "yet in some real and unforseen emergency an escape has "occurred, there is no such neglect as the act contemplates."

"If the question were regarded otherwise, the Act would "rather have said: 'If any such alien *shall escape* from such "'vessel, such master shall be deemed guilty of a misdemeanor, "'and shall be punished,' etc. In a case not merely doubtful, "but really meritorious, the fine would not have been incurred, "and the law would not impose it. * * * The law does

" not compel you, against your possible knowledge that there " was no failure whatever in good faith, or proper measures " to guard and prevent escape on the part of the master, " nevertheless to collect from him the amount of a fine which " is surely imposed only upon the guilty however their guilt " may be determined."

We, therefore, respectfully submit that such a construction as was put upon the plain and unambiguous language of Section 10 of the Act by the Warren case, and followed by the lower Court in the case at bar, cannot be justified. It is repugnant to reason and common sense, and we respectfully submit that the judgment is contrary to the law, and to the admitted facts in the case, and should, therefore, be reversed.

*Wherefore,* petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled, " H. Hackfeld & Company (Limited), a corporation, Plaintiff " in Error vs. The United States of America, Defendant in " Error," No. 940, to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled, "An Act to establish Circuit Courts " of Appeals and to define and regulate in certain cases the " jurisdiction of Courts of the United States, and for other " purposes," approved March 3, 1891, and that petitioner may have such other or further relief or remedy in the premises as to the Court may seem appropriate and in confirmity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

HACKFELD & COMPANY (Limited), a corporation.

By Maxwell Evarts

Its Attorney.

State of New York }
County of New York } ss

Maxwell Evarts, being first duly sworn, on oath says: I am the attorney for the above-named petitioner, and have read the foregoing petition and know the contents thereof. The said petition is true of my own knowledge except as to the matters which are therein stated on information and belief. As to those matters, I believe it to be true. I further state that the reason why I make this verification and why the same is not made by said petitioner is that said petitioner is a corporation resident of the Territory of Hawaii; that all of its officers reside in said Territory, and that the stay of mandate granted by the Circuit Court of Appeals for the purpose of permitting this application to be made will lapse before this petition can be forwarded to Hawaii for signature by the officers of said corporation, and filed in the Supreme Court of the United States.

Subscribed and sworn to before me this 18th day of December, A. D. 1903. Maxwell Evarts.

Charles Franklin
Notary Public in and for the
County of New York

(Seal)